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Problem of Age and Jurisdiction in the Juvenile Court

I. PROBLEM OF AGE AND JURISDICTION: A SURVEY

All states have either separate juvenile courts, or essentially a juvenile court procedure in other courts. However, the juvenile court concept in the United States varies greatly from one state to another. Notwithstanding this diversity, juvenile courts are confronted with many common problems. Because all of the statutes make juvenile delinquency jurisdiction dependent upon the age of the accused,¹ the problem of the age at which a person should be treated as a juvenile delinquent, rather than as an adult, is important both because it constitutes a problem within the juvenile court movement and because it extends to, and cuts across, several of the other common problems of juvenile courts.² Furthermore, the age standard adopted by the legislatures is significant as a statement of policy. It may denote incapacity to commit a crime.³ For example, if a juvenile court is given exclusive jurisdiction of all children under age sixteen, the child under sixteen may be regarded as incapable of committing a crime. His acts in violation of law would constitute delinquency and not be classified as a crime. Further, the age standard may indicate potential for rehabilitation.⁴ For instance, if a juvenile court has jurisdiction over children eighteen or under, children eighteen or under are viewed as likely to benefit from the special treatment afforded by the juvenile court. Even if the age standard of the statute does not indicate potential for rehabilitation, it may call attention to the desirability of children of certain ages being segregated from adult criminals.⁵ Finally, the age standard may denote when a child is thought to be "mature,"⁶ or may be only declaring that children below or between certain ages should be given a "first chance" before being subjected to the criminal court.⁷

1. See, e.g., TENN. CODE ANN. § 37-242 (Supp. 1965).

2. For discussion of the manifold problems currently confronting the juvenile court, see Gleuck, *Some 'Unfinished Business' In the Management of Juvenile Delinquency*, 15 SYRACUSE L. REV. 628, 629-30 (1964).

3. See text at note 13 *infra*.

4. For discussion of rehabilitative aims, see Herman, *Scope and Purposes of Juvenile Court Jurisdiction*, 48 J. CRIM. L., C & P.S. 590, 604 (1958).

5. See, e.g., TENN. CODE ANN. § 37-259 (Supp. 1965).

6. See Lopez-Rey, *Juvenile Delinquency, Maladjustment and Maturity*, 51 J. CRIM. L., C & P.S. 34 (1960).

7. See *In re Holmes*, 175 Pa. Super. 137, 103 A.2d 454 (1954), *aff'd*, 379 Pa. 599, 109 A.2d 523, *cert. denied*, 348 U.S. 973, where Judge Musmanno, dissenting, in speaking of the juvenile courts, says: "It has undoubtedly saved countless children from a life of crime Instead of citing the case of Shelley's children, I would refer to the

The focus of inquiry of this note is on the status of the law in the United States regarding the age at which the juvenile court has jurisdiction over delinquent children. Part I is a general survey of "the law" in the United States in light of the historical bases of the court. Part II is a detailed examination of one aspect of the problem of age and jurisdiction—the provisions by which the juvenile court can waive its jurisdiction and transfer the child to the criminal court. It is the outgrowth of a limited field study made to see the actual operation and implications of the waiver provisions in a particular setting. Tennessee and the Metropolitan Juvenile Court of Nashville were selected as the state and court because of ready access to material, but the remarks as to Tennessee courts and their operation are assumed illustrative or representative of other courts in other states. This note attempts to arrive at some general conclusions as to the role of the juvenile court in the United States.

A. *Legal Roots of the Juvenile Court*

Although the juvenile court is a creature of the legislature, it has legal roots that are deeply embedded in English jurisprudence.⁸ These are found in the treatment given to children by the English courts through the application of common law and equity doctrines for the protection of innocence and dependency.

One of the legal roots of the juvenile courts is a principle of equity or chancery, known as *parens patriae*, which originated because of the inflexibility of the common law and its failure to provide adequate remedies in deserving cases.⁹ Through this system of equity, the king acted as *parens patriae*, or as "father of his country," in exercising his power of guardianship over the persons and property of minors, who are considered wards of the state and, as such, entitled to protection.¹⁰ Under the change of government from a monarchy to a republic, as in the United States, the functions of *parens patriae* did not cease to exist; instead, the authority passed from the king to the government of the state or sovereign people, and it could be either exercised by the legislature or delegated by the legislature to other

writings of Charles Dickens (particularly *Oliver Twist*) in which the sheer brutality in treatment of unfortunate children makes one truly wonder at the contents of the hearts of both judges and civil administrators in the 'good old days.'" *Id.* at 628-29, 109 A.2d at 536.

8. Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364 (1937). For criticism of the application of *parens patriae* to children except where custody is involved, see Rappeport, *Determination of Delinquency in the Juvenile Court: A Suggested Approach*, 1958 WASH. U.L.Q. 123, 124.

9. 2 STORY, EQUITY JURISPRUDENCE § 1333 (8th ed. 1861).

10. *Id.* § 1328. An explanation given is that the king was bound by the law of common right to defend his subjects and their property. Since infants could not defend themselves, the king had to protect them.

functionaries.¹¹ Although originally equity had been used chiefly to protect the dependent or neglected with property interests, its action prefigured the protective intervention of the state through the instrumentality of the juvenile court in cases of delinquency.¹²

The other legal root of the juvenile court is the presumption of innocence thrown about children by the common law. At common law a child under the age of seven is conclusively presumed incapable of entertaining a criminal intent, and therefore, of committing a crime.¹³ Between the ages of seven and fourteen incapacity is presumed, but the presumption may be rebutted by a showing that the child knew the nature and wrongfulness of the conduct.¹⁴ After the age of fourteen, the child is treated as fully responsible for his actions.¹⁵

The harshness of the criminal law toward children, even with the presumption operating to their benefit, is shown in the administration of criminal laws of early England. Many children were executed by hanging or decapitation for comparatively trivial offenses.¹⁶ As for more serious offenses, Blackstone records that a girl of thirteen was burned for killing her mistress, a boy of ten was hanged for killing his companion, and a boy of eight was hanged for arson.¹⁷ Further, he tells of a boy of ten being convicted and hanged since sparing the boy on account of his age might have endangered the public by propagating the notion that children might commit atrocious crimes with impunity.¹⁸

The presumption of innocence has been attacked on two grounds. First, the courts find it difficult to decide how they should apply the presumption and also differ as to the quantum of proof required to show a guilty intention.¹⁹ Second, where the presumption is strictly honored, many prosecutions are not brought because guilty intention cannot be proved; conversely, some of the prosecutions that are

11. *Ewell v. Sneed*, 136 Tenn. 602, 191 S.W. 131 (1917).

12. See *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952).

13. See *Heilman v. Commonwealth*, 84 Ky. 457 (1886).

14. 4 BLACKSTONE, COMMENTARIES 23 (2d ed. rev. 1872). See also TAFT, CRIMINOLOGY 559 (1945). "When concerned with children between the ages of seven and fourteen, the court would investigate largely in terms of the nature of the act, whether or not a particular child had a 'guilty mind'—such *mens rea* being requisite to full responsibility."

15. See MODEL PENAL CODE § 4.10 (Tent. Draft No. 7, 1957), for a more complete examination of the operations of the common law presumption.

16. 1 WHARTON, CRIMINAL LAW 478 (12th ed. 1932).

17. BLACKSTONE, *op. cit. supra* note 14, at 22-23.

18. *Id.* at 23.

19. Report of The Committee On Children and Young Persons 36, presented to Parliament in 1960 with Viscount Ingleby as chairman. [hereinafter cited as Ingleby Report].

brought fail for lack of such proof.²⁰ The difficulty arises from the principles of criminal law being worked out and expressed in terms of right and wrong. These principles have proved difficult to apply to children.²¹

During most of the nineteenth century in the United States, child and adult offenders were treated similarly although intermittent steps were taken regarding their separate confinement.²² As of 1957, the common law rule regarding the criminal responsibility of children was still the law in a majority of jurisdictions, either by statute or case law.²³ However, by the turn of the century modern concepts had begun to take form which embodied an upward movement in a child's age of criminal responsibility. This movement was prompted by the increase in the complexity of social relationships, the growth of humanitarianism, and the rise of the social sciences.²⁴ The conception of a particular age giving a dividing line between "getting off" and suffering was essential to the common law.²⁵ Under the common law an exemption was a complete defense and, thus, there were no further steps that a court could take even though a child might be in need of care and protection.

B. *The First Juvenile Court*

Introduction of the juvenile court represented a significant departure from traditional judicial procedure by shifting emphasis from retributive justice and criminal court procedure to that of rehabilitation, protection, and informality.²⁶

The first tribunal created to deal specifically with the problems of juvenile delinquency was established in Chicago in 1899, the Juvenile Court of Cook County.²⁷ Certain facts about this first court furnish a perspective from which to view the juvenile court movement.²⁸ A juvenile delinquent was defined as any child under the age of seventeen years who had violated any law of the state, any law of

20. *Ibid.*

21. *Id.* at 31.

22. See *State v. Monahan*, 15 N.J. 34, 104 A.2d 21, 22 (1954), for a brief historical survey of the treatment of children in the criminal courts of the United States.

23. MODEL PENAL CODE, *supra* note 15. See also *Thomas v. Commonwealth*, 300 Ky. 480, 189 S.W.2d 686 (1945), where an eleven-year-old boy was convicted of raping a five-year-old girl, and *State v. Fischer*, 245 Iowa 170, 60 N.W.2d 105 (1953), where a fourteen-year-old boy was convicted of murder.

24. Caldwell, *The Juvenile Court: Its Development and Some Major Problems*, 51 J. CRIM. L., C & P.S. 493, 494 (1961).

25. Ingleby Report at 21.

26. Governor's Special Study Commission on Juvenile Justice, Report pt. II, *A Study of the Administration of Juvenile Justice in California 1* (1960). [hereinafter cited as Comm'n Report pt. II]. Cf. Rappeport, *supra* note 8, at 131.

27. ILL. LAWS 1899, ch. 23, § 2.

28. For a good summary of the act, see Caldwell, *supra* note 24, at 495.

a city, or any village ordinance.²⁹ The law did not stipulate that juvenile delinquents should not be punished; it provided that the child should receive approximately the same care, custody, and discipline that his parents should give to him.³⁰ Similarly, the juvenile court was to be a special court and not an administrative agency.³¹ Furthermore, the act provided that "This act shall be liberally construed, to the end that its purpose may be carried out"³² Undoubtedly a basic premise of the act was that the juvenile court would be better equipped than the criminal court to deal with the juvenile violator.³³ In other words, a primary objective of the juvenile court was to take the child offender out of the criminal court and protect them from the criminal procedure and its effects.³⁴

Two fundamental changes in the handling of juvenile offenders have been assigned to this first act.³⁵ It raised the age below which a child could not be a criminal from seven to sixteen and made an allegedly delinquent child subject to the jurisdiction of the juvenile court. Also, it placed the operation of the court under equity jurisdiction and thus extended the application of the principle of guardianship, which had been used to protect neglected and dependent children, to all children, including juvenile delinquents, who were in need of protection by the state.

C. *Requisite Age and Present Status of Juvenile Courts*

Although there are approximately three thousand juvenile courts in the United States,³⁶ one critic has remarked that "In well over 2000 counties . . . nobody has ever seen a well-staffed, modern juvenile court in action."³⁷ But a fact more basic to this study is that even though all juvenile courts have jurisdiction over delinquent acts, the juvenile court laws themselves differ with respect to the age at which a child is subject to the jurisdiction of the court.

The laws of most states do not specify any lower age limit; they merely provide that children under a certain age are subject to the jurisdiction of the court. A lower age limit of ten is specified in Texas,³⁸ apparently to indicate the minimum age at which a person

29. ILL. LAWS 1899, ch. 23, § 9(a).

30. Caldwell, *supra* note 24, at 495.

31. *Ibid.*

32. ILL. LAWS 1899, ch. 23, § 21.

33. RUBIN, CRIME AND JUVENILE DELINQUENCY 47 (2d ed. 1961).

34. *Id.* at 49.

35. Caldwell, *supra* note 24, at 495-96.

36. *Id.* at 499.

37. Carr, *Most Courts Have to be Substandard*, 13 Fed. Prob., Sept. 1949, No. 3, p. 31.

38. TEX. REV. CIV. STAT. art. 2338-1, §§ 3, 12 (Supp. 1965).

is capable of committing a crime.³⁹ Setting a lower age limit has been criticized on the ground that "[s]ince the interest and needs of the child, not criminal guilt for a particular offense, are the focal consideration of the juvenile court program,"⁴⁰ children excluded because of sub-criminal age do not become "recipients of the valuable corrective and preventive treatment afforded by the system."⁴¹

All states, however, impose an upper age limit. Most states make eighteen the upper age limit,⁴² although some states set the limit at

39. Bogatto & Sewell, *Age and Related Jurisdictional Problems of the Juvenile Courts*, 36 TEXAS L. REV. 323, 325 (1958).

40. *Id.* at 338.

41. *Ibid.*

42. A recent article asserts that three-fourth of the states make eighteen the upper age limit. Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELINQUENCY 3, 4 (1962). For a collection of the statutes as of 1958, see SUSSMAN, LAW OF JUVENILE DELINQUENCY (1959).

The following list was prepared by Mrs. Alice B. Freer, a program analyst in the Office of the Director of the Division of Juvenile Delinquency Service of the Children's Bureau of the Department of Health, Education and Welfare, as of February, 1965:

State	Waiver Age	Jurisdiction Age
Alabama	14	16
Alaska	None stated	18
Arizona	No Waiver	18
Arkansas	None stated	18
California	16	Minor (21)
Colorado	No Waiver	18
Connecticut	Under 16	16
Delaware	16	18
District of Columbia	16	18
Florida	14	17
Georgia	15	17
Hawaii	Under 18	18
Idaho	16	18
Illinois	Any case	17M, 18F
Indiana	15	18
Iowa	No Waiver	18
Kansas	M16, F 18	M16, F18
Kentucky	16	18
Louisiana	No Waiver	17
Maine	Any juvenile	17
Maryland (Montgomery County)	16-18	18 (except Baltimore which is 16)
Massachusetts	14-17	17
Michigan	15	17 (17-19)
Minnesota	14	18
Mississippi	13	18
Missouri	14	17
Montana	16	18 (21)
Nebraska	No Waiver	18
Nevada	16	18
New Hampshire	None stated	18
New Jersey	16-17	18
New Mexico	14	18

sixteen⁴³ or seventeen⁴⁴ and a few place it as high as twenty-one.⁴⁵ Some of the factors which influence the states in setting their age limit are disclosed in a recent study of the California juvenile courts.⁴⁶ The study concluded that "The older the child the larger is the proportion of his age group represented among referrals" and that "most juveniles referred to probation departments for delinquent behavior are sixteen years of age or older."⁴⁷ The study reveals that the fourteen-year-old minors comprised less than twelve per cent of referrals, fifteen-year-old children comprised over eighteen per cent of the referrals, and sixteen-year-old and seventeen-year-old minors each accounted for about twenty-one per cent of the referrals.⁴⁸ Of these referrals, fifty-eight per cent were charged with specific criminal offenses, with theft, burglary, and auto theft comprising seventy per cent of this group.⁴⁹ Assault, robbery and homicide constituted only eight per cent of the fifty-eight per cent total.⁵⁰ Thus, only a small group of the referrals have allegedly committed serious bodily offenses.

The advocates of a reduction in age limits point to "mollycoddling and leniency in the juvenile court,"⁵¹ while the proponents of the

New York	No Waiver	16
North Carolina	14	16
North Dakota	14	18
Ohio	Any age	18
Oklahoma	None stated	18F, 16M
Oregon	16	18
Pennsylvania	14	18
Rhode Island	16	18
South Carolina	Any child	17
South Dakota	None stated	18
Tennessee	16	18
Texas	No Waiver	M17, F18
Utah	14	18
Vermont	No Waiver	16
Virginia	14	18
Washington	None stated	18
West Virginia	16	18
Wisconsin	16	18
Wyoming	No waiver	18

43. *E.g.*, ALA. CODE tit. 13, § 350 (1959).

44. *E.g.*, FLA. STAT. ANN. § 39.01 (1961).

45. *E.g.*, CAL. WELFARE & INST'NS § 600 (Deering 1961).

46. The study is composed of two parts: Governor's Special Study Commission on Juvenile Justice, Report pt. I, *Recommendations for Changes in California's Juvenile Court Law* (1960). [hereinafter cited as Comm'n Report pt. I]; Comm'n Report pt. II. See note 26 *supra*.

47. Comm'n Report pt. II, at 94.

48. *Id.* at 34.

49. *Id.* at 34-35.

50. *Id.* at 35.

51. Rector, *An Age of Reason for the Juvenile Court*, 8 CRIME & DELINQUENCY 1 (1962).

court counter that often a child receives a more severe treatment in the juvenile court than in the criminal court since the criminal court very often imposes only a fine or fails to commit a child for as long a period of time as the juvenile court might.⁵² Despite the conclusion of the study indicating that there is a correlation between increased age of offender and increased number of referrals,⁵³ a significant fact, indeed, is that no state has lowered its age limit since 1923.⁵⁴

In a few states the upper age limit differs according to the sex of the child. Kansas, until 1965, limited its jurisdiction in delinquency cases to boys below sixteen while girls eighteen or under were subject to the jurisdiction of the juvenile court.⁵⁵ Distinctions based on sex have been criticized especially where the age limit for girls is lower than the age limit for boys.⁵⁶ A critic of the recently repealed Kansas statute has remarked that "the use of two entirely different procedures and laws for reprimanding different members of a group, when the distinction is drawn solely on the fact of age, causes one to question the sagacity of the statute."⁵⁷

At this point, a fundamental limitation on the juvenile court's power should be emphasized. The juvenile court can exert its power over the offender only during his minority, and the statutes so provide.⁵⁸ For it to purport to direct action over an individual beyond his minority would seem to be unconstitutional since the rationale used for the court's constitutional authority is that it is acting in the non-punitive capacity of *parens patriae*.⁵⁹ A power to institutionalize for longer than minority would constitute a criminal punishment. Recognizing the nature of the proceedings in the juvenile court, such exertion of power would, doubtless, be constitutionally prohibited.⁶⁰

Notwithstanding the controversy and discussion as to the age limit for the court's jurisdiction, only the exceptional state statute bestows exclusive jurisdiction of all juveniles, regardless of the offense charged,

52. *Ibid.*

53. See statistics in text at note 48 *supra*.

54. Comment, 10 KAN. L. REV. 586, 588 (1962).

55. KAN. LAWS 1957, ch. 256, § 6. The age differentiation according to sex was repealed by KAN. LAWS 1965, ch. 278, § 2. See KAN. STAT. ANN. § 38-806(c) (Supp. 1965).

56. "[Girls of this age bracket are usually much more mature than boys and hence it would seem boys from 16 to 18 are much more in need or at least as much in need of the help and understanding of the juvenile court as girls of this age." Comment, 10 KAN. L. REV. 586, 588 (1962).

57. Comment, 6 KAN. L. REV. 347, 349 (1958).

58. See, e.g., TENN. CODE ANN. § 37-263 (Supp. 1965).

59. See *Petition of Morin*, 95 N.H. 518, 68 A.2d 668 (1949).

60. "The act in question is designed to permit the exercise of the powers of the state as 'parens patriae,' for the purpose of rehabilitating minor children, and not of punishing them for the commission of a crime." *Id.* at 520, 68 A.2d at 670.

on the juvenile court.⁶¹ Virtually all states provide for trial in the criminal courts in some circumstances. Moreover, there appear to be at least four modes of allocating jurisdiction between the juvenile court and the criminal court.⁶²

First, the statute may exempt young juveniles from criminal jurisdiction for all crimes while providing for criminal court jurisdiction for the older group for certain categories of offenses. Montana defines a child as "a person less than eighteen years of age,"⁶³ but provides that:

a child over the age of sixteen (16) years who commits or attempts to commit murder, manslaughter, rape . . . arson in the first and second degree, assault in the second degree, assault in the first degree, robbery, first or second degree burglary while having in his possession a deadly weapon, and carrying a deadly weapon or weapons with intent to assault, shall not be proceeded against as a juvenile delinquent but shall be prosecuted in the criminal court.⁶⁴

The courts have construed the statute as providing that children under the age of sixteen may never be tried for a law violation in the criminal court as they are under the exclusive jurisdiction of the juvenile court.⁶⁵ The statute has been criticized for providing for a categorical, mandatory transfer, with the seriousness of the offense as the only criterion.⁶⁶

A second common mode is to provide for original and exclusive jurisdiction for all juvenile court ages but to authorize the juvenile court to waive jurisdiction in all or certain cases. The Maryland statute provides that "the judge shall have [an] . . . original, exclusive jurisdiction concerning any child who is . . . delinquent,"⁶⁷ but that "[i]f any such child is charged with the commission of an act or acts which would amount to a misdemeanor or felony if committed by an adult, the judge, after full investigation, may in his discretion waive jurisdiction and order such child held for action under the regular procedure that would follow if such act or acts had been committed by an adult."⁶⁸ The courts, have however, held that the juvenile can be held as an accomplice even though he cannot be

61. Texas has such a statute. See TEX. REV. CIV. STAT. art. 2338-1, §§ 3, 5 (Supp. 1965).

62. PAULSEN & KADISH, *CASES ON CRIMINAL LAW AND ITS PROCESSES* 103 (1962).

63. MONT. REV. CODES ANN. § 10-602 (Supp. 1963).

64. MONT. REV. CODES ANN. § 10-602 (Supp. 1963).

65. State *ex rel.* Dahl v. District Court, 134 Mont. 395, 333 P.2d 495 (1958).

66. Geis, *Publication of Names of Juvenile Felons*, 23 MONT. L. REV. 141, 142 (1962).

67. MD. ANN. CODE art. 26, § 53 (Supp. 1964).

68. MD. ANN. CODE art. 26, § 54 (Supp. 1964).

charged with the substantive crime unless the juvenile court waives jurisdiction.⁶⁹

A third common mode of treatment is to grant the criminal courts jurisdiction concurrent with the juvenile court over all juveniles or over certain offenses with the criminal court having power to assert or waive jurisdiction. While the Arizona statute provides that the juvenile court "shall have exclusive original jurisdiction in all proceedings and matters affecting . . . delinquent children, or children accused of crime under the age of eighteen years,"⁷⁰ the Arizona Supreme Court has held that suspension of criminal proceedings against a child under eighteen is discretionary with the trial judge since juvenile law affects the treatment and not the capacity of the offender.⁷¹ However, the juvenile court has the power both to refuse to suspend criminal prosecution and to enter its order permitting criminal prosecution to proceed.⁷² The result seems to be concurrent jurisdiction by the two courts. Practice under such a system has been described as a "labyrinth of confusion."⁷³

The fourth method is to grant the criminal courts exclusive jurisdiction over certain offenses. The Tennessee statute provides that:

If . . . the judge of the juvenile court shall conclude that there is probable cause to believe that the child has been guilty of the crime of rape . . . or murder in first degree or robbery by use of a deadly weapon, the court shall at once dismiss said cause and assume no further jurisdiction thereof than to remand said child . . . to be dealt with for his alleged offense, as provided in the criminal laws.⁷⁴

Evidently, before 1965, any child in Tennessee under sixteen who committed murder or rape had to be tried in the criminal court,⁷⁵ although Tennessee, purportedly, still recognized the common law presumptions of children seven and fourteen years of age.⁷⁶

A recent California statute may be examined as illustrative of the trend for juvenile court statutes in the future.⁷⁷ The revision of the California juvenile court law in 1961 was based largely upon the recommendations of a Special Study Commission on Juvenile Justice

69. *Haniday v. State*, 228 Md. 593, 182 A.2d 40 (1962).

70. ARIZ. REV. STAT. ANN. § 8-202 (1956).

71. *Burrows v. State*, 38 Ariz. 99, 297 Pac. 1029 (1931).

72. *State v. Henderson*, 34 Ariz. 430, 272 Pac. 97 (1928).

73. *Molloy, Juvenile Court*, 4 ARIZ. L. REV. 1 (1962).

74. TENN. CODE ANN. § 37-265 (Supp. 1965).

75. See discussion in *Greene v. State*, 210 Tenn. 276, 358 S.W.2d 306 (1962). In 1965, a proviso was added to the statute to the effect that if the child is under the age of fourteen (14) years, the juvenile court judge need not remand to the criminal court. TENN. ACTS 1965, ch. 131, § 1.

76. See *Juvenile Court v. Humphry*, 139 Tenn. 549, S.W. 771 (1918).

77. For a discussion of the California statutes, see Note, 51 CALIF. L. REV. 421 (1963).

which convened in 1957 and issued its final report in 1960.⁷⁸ The juvenile court has jurisdiction of youths under twenty-one years of age. It has exclusive jurisdiction over all minors under sixteen,⁷⁹ original jurisdiction over minors sixteen to eighteen,⁸⁰ and jurisdiction concurrent with the criminal court over minors eighteen to twenty-one.⁸¹ The statute has been praised for its consistency with the presumption that all young people who have run afoul of the law can be rehabilitated if properly treated.⁸² This statute might be contrasted with the even more recent New York Family Court Act which provides generally for original exclusive jurisdiction over juvenile delinquents only up to age sixteen.⁸³ However, a report accompanying the revision stated the age sixteen to be only a tentative inclusion.⁸⁴

Regardless of the statutory prescriptions, the courts typically have shown an eagerness to carve exceptions into exclusive juvenile court jurisdiction or to widen the scope of legislatively created exceptions. In carving out new exceptions to exclusive juvenile court jurisdiction bestowed by the legislature, two techniques have been utilized most often.⁸⁵ The courts have held grants of exclusive jurisdiction to the juvenile courts to be unconstitutional under state constitutions, and, second, by a process of construction, often tortured, have concluded that the legislature could not have intended to confer exclusive jurisdiction.

The constitutional method can be illustrated by developments in Georgia. The Georgia juvenile court law explicitly conferred original exclusive jurisdiction to the juvenile court in all cases involving offenders under seventeen years of age, with power to waive jurisdiction.⁸⁶ However, using a provision in the Georgia Constitution stating that the "superior court shall have exclusive jurisdiction . . . in criminal cases where the offender is subjected to loss of life or confinement in the penitentiary,"⁸⁷ the court held, in *Jackson v. Balkcom*,⁸⁸ that exclusive original jurisdiction in the juvenile court

78. See note 46 *supra* and accompanying text.

79. CAL. WELFARE & INST'NS § 600-02 (Deering 1961).

80. CAL. WELFARE & INST'NS § 604 (Deering 1961).

81. CAL. WELFARE & INST'NS § 607 (Deering 1961).

82. Note, *supra* note 77, at 423.

83. N.Y. FAMILY CT. ACT §§ 712-13 (McKinney 1963).

84. N.Y. FAMILY CT. ACT § 712 (McKinney 1963), at comments accompanying. For the report, see New York Joint Legislative Committee on Court Reorganization, VII, *Young Offenders and Court Reorganization* (1963).

85. Herman, *Scope and Purposes of Juvenile Court Jurisdiction*, 48 J. CRIM. L., C. & P.S. 590, 602 (1958).

86. GA. CODE ANN. § 24-2408 (1959).

87. GA. CONST. art. 6, § 4.

88. 210 Ga. 412, 80 S.E.2d 319 (1954).

constituted an unconstitutional usurpation of the exclusive jurisdiction of the criminal court in certain criminal cases. Thus, in Georgia, a sixteen-year-old boy has been convicted for murder,⁸⁹ a negro boy of sixteen sentenced to electrocution for rape of a white female,⁹⁰ and a fourteen year old convicted for manslaughter.⁹¹ Because of the constitutional limitations, the juvenile court had discretionary power to transfer jurisdiction to the criminal court in all cases where a penitentiary sentence may be rendered, but no power to withhold jurisdiction from the criminal court.

Courts utilizing the second technique have usually been confronted with an ambiguous juvenile court statute,⁹² or with other statutory provisions in conflict with the juvenile court code.⁹³ It has been suggested, however, that the process of construction used by some courts could be consistent only with hostility to the juvenile court laws.⁹⁴

However, not all courts have been hostile to the juvenile courts. More commonly, the juvenile court acts have been sustained as constitutionally permissible.⁹⁵ Further, some state appellate courts have looked with favor at legislative grants of exclusive jurisdiction to the juvenile courts. Louisiana courts have held that where the juvenile court statute gives the juvenile court exclusive jurisdiction over all but capital offenses, a criminal court does not have jurisdiction on a murder indictment to convict for manslaughter.⁹⁶ New York courts have held that where the juvenile courts have exclusive jurisdiction for all but capital cases, a felony-murder conviction cannot be obtained since no independent felony existed due to the fact that an independent felony was not a capital crime.⁹⁷ Furthermore, a New Jersey case, *State v. Monahan*,⁹⁸ apparently overruled *In Re Mer*⁹⁹ which had held that fifteen-year-old could be convicted for murder despite a statutory stipulation that a person under sixteen was incapable of committing a crime.

89. *Jones v. Balkcom*, 210 Ga. 689, 82 S.E.2d 657 (1954).

90. *Jackson v. Balkcom*, *supra* note 88.

91. *Armstrong v. State*, 90 Ga. App. 173, 82 S.E.2d 51 (1954).

92. See, e.g., *State v. McCoy*, 145 Neb. 750, 18 N.W.2d 101 (1945).

93. *State v. Burnett*, 179 N.C. 735, 102 S.E. 711 (1920).

94. *Herman*, *supra* note 85, at 602.

95. See, e.g., *ex parte Sharp*, 15 Idaho 120, 96 Pac. 563 (1908) (not unlawful interference with relation of parent and child); *Wheeler v. Shoemaker*, 213 Miss. 374, 57 So. 2d 267 (1952) (cruel and inhuman punishment); *Ex parte Naccarat*, 328 Mo. 722, 41 S.W.2d 176 (1931) (equal protection and due process); *Mill v. Brown*, 31 Utah 473, 88 Pac. 609 (1907) (special law).

96. *State v. Bedford*, 193 La. 104, 190 So. 347 (1939).

97. *People v. Roper*, 259 N.Y. 170, 181 N.E. 88 (1932).

98. 15 N.J. 34, 104 A.2d 21 (1954).

99. 122 N.J. Eq. 125, 192 Atl. 80 (1937).

As a guide for legislative revision, the Standard Juvenile Court Act Committee published its Revised Standard Act in 1959.¹⁰⁰ The act provides generally that "the court shall have exclusive original jurisdiction in proceedings: (1) Concerning any child . . . prior to having become eighteen years of age."¹⁰¹ As an exception to its exclusive jurisdiction, it provides that "in the case of a child sixteen years of age or older" who has committed an act that would be a felony if committed by an adult, the juvenile court may, in its discretion, certify the child to the criminal court after full hearing and investigation.¹⁰² Notably, the act explicitly states that "No child under sixteen years of age at the time of commission of the act shall be so certified."¹⁰³ The Committee recognized the authorization of a transfer as a necessity since some sixteen and seventeen year olds, and some younger, have developed tendencies which render them impervious to the average juvenile court.¹⁰⁴ Of interest is that the National Council of Juvenile Court Judges had recommended that fourteen be the age specified for certification.¹⁰⁵ As indicated, such a proposal was rejected.

The Committee's proposed statute, in its entirety, has not elicited vehement criticism but one writer has taken issue with a feature of the act. Professor Robert Caldwell maintains that the criminal court should have original jurisdiction where a child sixteen years of age or over is charged with serious felonies, having the authority to transfer such cases to the juvenile court.¹⁰⁶ He reasons that since the criminal court is held responsible for the security of society and is organized and administered especially for this purpose, it must have this power if the criminal law is to remain operative and if vigorous law enforcement is to be encouraged. Not to give the criminal court the power and thus assent to vigorous law enforcement, he suggests, "may lead the impressionable young to conclude that fracturing someone's skull is no more immoral than fracturing his bedroom window."¹⁰⁷ Statistics which have pointed to a large and increasing percentage of serious crimes being committed by young people have influenced his decision to give the criminal court such original jurisdiction.¹⁰⁸

100. Standard Juvenile Court Act (1959), in 5 NAT'L PROB. & PAROLE ASS'N J. 323-91 (1959). [hereinafter cited as Standard Act.]

101. Standard Act § 8.

102. Standard Act § 13.

103. *Ibid.*

104. Standard Act, comments accompanying § 13.

105. *Ibid.*

106. Caldwell, *The Juvenile Court: Its Development and Some Major Problems*, 51 J. CRIM. L., C. & P.S. 493, 509 (1961).

107. *Ibid.*

108. For some recent statistics, see Hoover, *Juvenile Delinquency or Youthful*

An answer to Professor Caldwell's proposal is that the juvenile court should be uniquely organized to weigh the interests of society and the interests of the individual child in making a decision.¹⁰⁹ The juvenile court, as is the criminal court, is also responsible to society. If the juvenile court is not so organized or does not adequately assume its responsibility, only then should the criminal court have the initial, original jurisdiction with power to waive.

In summary, in some states children up to a certain age are immune from criminal prosecution. Apparently they are deemed incapable of committing a crime. This immunity might also result from assuming that children up to a certain stage in their development are potentially capable of being rehabilitated. In actuality, even if a child is regarded as incapable of committing a crime, a conclusive presumption does not operate to free him of all responsibility for his actions. Being adjudicated a delinquent should not be equated with "getting off." Supposedly, the delinquent receives individual treatment—be it harsh or be it mild. Setting an age limit for the court's exclusive jurisdiction does impair the court's flexibility. However, society has a stake in the venture which must be respected. But the age standard that is established need not be an arbitrary determination. Various professional groups and informal study commissions have concluded that age sixteen is the proper standard. In most of the states, however, the juvenile court does not have exclusive jurisdiction over all children. The court has jurisdiction over specified groups of children up to a certain age limit. A substantial majority of the states set the age limit at age eighteen. The juveniles who demonstrate an "unfitness" for reformation either when they appear before the juvenile court or after treatment has begun, may be criminally prosecuted. The legislature often prescribes the criteria for determining "unfitness."

D. *Special Problems*

Before concluding this inquiry, two special facets of the problem of age and jurisdiction in the juvenile court deserve brief comment. The two are: (1) At what point of time is the age of the child determinative for purposes of ascertaining juvenile court jurisdiction? (2) Does age refer only to chronological age, or can it refer to mental

Criminality?, 15 SYRACUSE L. REV. 660 (1964).

109. For a discussion of the procedure in the juvenile court, see PROCEDURE AND EVIDENCE IN THE JUVENILE COURT 3 (1962), a publication of the National Council on Crime and Delinquency. Two advantages which the juvenile court has over the criminal court are: (1) the juvenile court's procedure is more flexible (2) the juvenile court was established to mitigate some of the harsh effects emanating from criminal court jurisdiction over children.

age? The second has received little attention in courts and legislatures but has generated discussion by a few writers.

Basically, two points of time have been used to determine if the juvenile court has jurisdiction over the child—the age at the time of the commission of the offense,¹¹⁰ and the age at the time of the trial.¹¹¹ There is a sharp conflict of authority as to which of these should be conclusive, the determination of the problem apparently depending upon the wording of the statutory provisions in the various jurisdictions. Apparently a majority of the jurisdictions have concluded that the time of the trial, rather than time of alleged commission of the offense, controls.¹¹² Thus, usually a child who commits an offense while he is of juvenile age becomes amenable to criminal prosecution if he is indicted after passing the maximum age limit for jurisdiction of the juvenile court.

The principal justifications for requiring the age at time of trial to be determinative are that one who committed a serious crime as a juvenile but remained un-indicted until after the operation of juvenile jurisdiction had ceased might be allowed to escape with impunity,¹¹³ and that an adult, guilty of a crime committed as a juvenile, would not be an appropriate subject for an initial application of juvenile protection and reformation.¹¹⁴ One writer has observed that jurisdictions that utilize the time of commission of the offense as a standard exclude, by express terminology or judicial discretion, the more serious crimes.¹¹⁵ The most penetrating criticism of adopting this standard is that it allows the purposes of juvenile legislation to be frustrated by delays that eventually permit criminal prosecution while eliminating the applicability of the juvenile act.¹¹⁶

In contrast, the use of a standard based upon the age at the time of the offense has been praised as necessary to implement the purposes of the juvenile law.¹¹⁷ Such a criterion would avoid most, if not all, of the problems concerning subsequent criminal prosecutions and protestations of former jeopardy. Thus, a child who had been committed to a state training school for juvenile delinquency would not be subject to a criminal prosecution for the same offense after his re-

110. N.Y. FAMILY COURT ACT § 714 (McKinney 1963).

111. TEX. REV. CIV. STAT. art. 2338-1, § 12 (Supp. 1965). See *Northern v. State*, 152 Tex. Crim. 569, 216 S.W.2d 192 (1948).

112. 48 A.L.R. 2d 665, 696 (1954).

113. *McLaren v. State*, 85 Tex. Crim. 31, 209 S.W. 669 (1919).

114. Bogatto & Sewell, *Age and Related Jurisdictional Problems of the Juvenile Courts*, 36 TEXAS L. REV. 323, 327 (1958).

115. *Ibid.*

116. See *Mattingly v. Commonwealth*, 171 Ky. 222, 224-25, 188 S.W. 370, 371 (1916).

117. *Id.* at 225, 188 S.W. at 371.

lease.¹¹⁸ Likewise, a child who had been placed under juvenile jurisdiction would not become subject to criminal prosecution after he had passed the maximum age limit for juvenile jurisdiction. The Standard Juvenile Court Act apparently adopts the age at time of the offense as controlling.¹¹⁹ However, such reasoning occasionally might lead to an absurd application, as in *Johnson v. State*,¹²⁰ where a twenty-six-year-old man who had been criminally convicted of a homicide committed as a juvenile gained his release from prison through writ of habeas corpus and had his case remanded to juvenile court. But if discretion is vested in the juvenile court judge, the possibility that an adult would be subject to the jurisdiction of the juvenile court is rendered unlikely.

The problem of chronological age versus mental age raises interesting possibilities. In *State v. Schilling*,¹²¹ the defendant was twenty-eight years old, but had a mental age of eleven. He requested the court to charge the jury that, if it found him to have a mental age under twelve years, he would be presumed incapable of committing a crime and a burden would be placed upon the state to show capacity before they could convict him. Although the question presented by this case is whether a "mental infant" of adult age should receive the same treatment as an adult of normal mentality, the question could be phrased as whether a "mental infant" should be subject only to the jurisdiction of the juvenile court.¹²² No juvenile court statute at the present makes provision for such jurisdiction and apparently the likelihood of extending the jurisdiction to include such situations has not been seriously considered. A major obstacle is that psychologists and psychiatrists are not entirely in accord as to the accuracy of mental tests administered to adults where the results are given in mental ages.¹²³ However, if the criminal law has been built upon the theory that a person should be held criminally responsible only for acts which he intends to commit, a challenge to the juvenile court might be imminent.¹²⁴

The defense would be composed of two elements: (1) establishing a mental condition, and (2) translating the mental condition into a

118. See *Deering v. State*, 151 Tex. Crim. 6, 204 S.W.2d 983 (1947), where such happened. *But cf. Garza v. State*, 369 S.W.2d 36 (Tex. Crim. App. 1963), commented on in 17 VAND. L. REV. 291 (1963).

119. Standard Act § 9.

120. 18 N.J. 422, 114 A.2d 1 (1955), *cert. denied*, 350 U.S. 942 (1955).

121. 95 N.J.L. 145, 112 Atl. 400 (1920).

122. Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 453 (1939). This article contains a good discussion of the problem. See also GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 426 (1952).

123. Woodbridge, *supra* note 122, at 454. For more recent statement, see Note, 43 CORNELL L. Q. 283, 284 (1952).

124. For the elements of a crime, see LUDWIG, *YOUTH AND THE LAW* 4 (1955).

mental age.¹²⁵ The first element of the defense would utilize the doctrine of partial responsibility, which rests upon the proposition that a defendant should not be held responsible for a degree of crime requiring as one of its elements a mental state that he is incapable of achieving.¹²⁶ By using the doctrine of partial responsibility, the defendant would not have to establish a mental condition sufficient to secure acquittal, that is, by satisfying the tests of criminal responsibility.¹²⁷ The defendant might be able to distinguish right from wrong and still utilize the defense.¹²⁸ For the juvenile court to acquire jurisdiction, however, the mental condition would have to be equated with a mental age that would satisfy its "age" requirement.

Although the jurisdiction of the juvenile court might well extend to "mental children," the difficulties inherent in such an extension may forbid the juvenile court taking jurisdiction.¹²⁹

E. *Conclusion as to Survey*

The age limits which define the jurisdiction of the juvenile court are of significance to the function of the court, ranging from a presumption of incapacity to commit a crime to a mere declaration that children of certain ages should be given a "first chance." The function of the juvenile court is to operate as a court, not as an administrative agency. It must protect the child from the traumatic experiences of a criminal trial and provide more flexible machinery for balancing the interests of the child and the community in the light of recent knowledge regarding human behavior. As a court it must not only express the values of the society in which it functions but also reinforce those values. In other words, the juvenile court may both preach and practice rehabilitation, but it must recognize that a child who is adjudged a delinquent has violated the moral values of society. However, rehabilitation and the protection of society are not necessarily inconsistent goals. To effectively function as a "legal" court and to administer "equitable" relief, however, the juvenile court must be a flexible instrument. In like manner, the jurisdictional limits of the court must be flexible within reasonable limitations.¹³⁰

125. For difficulties, see GUTTMACHER & WEIHOFEN, *op. cit. supra* note 122.

126. See LINDMANN & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 355 (1961), for a full discussion of partial responsibility.

127. Some courts have seemingly considered low mentality on par with a legal test for insanity. See, *e.g.*, *State v. Kelsie*, 93 Vt. 450, 452, 108 Atl. 391, 392 (1919).

128. LINDMANN & MCINTYRE, *op. cit. supra* note 126, at 355.

129. For difficulties of proof, see LINDMANN & MCINTYRE, *op. cit. supra* note 126, at 336-52.

130. For recent appraisals of the juvenile court, see Allen, *The Juvenile Court and The Limits of Juvenile Justice*, 11 WAYNE L. REV. 676 (1965); Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585 (1965); Paulsen, *The*

II. THE WAIVER PROCESS IN TENNESSEE

Since the often-debated issue of the upper age level for juvenile court jurisdiction is presented most sharply in relation to the child over which jurisdiction may be waived,¹³¹ this chapter will explore in some detail the waiver provisions of the juvenile court act in Tennessee.¹³² The purpose of the study is not merely to analyze and define Tennessee law, but, more importantly, to explore the waiver provisions within the setting of a particular location. An attempt will be made to identify the criteria which appear to be involved in the exercise of authority to waive jurisdiction and the implications of waiver for the theory of juvenile court procedure.

To get a clearer picture of the waiver process and problems implicit in its function, a limited field study was made. First, the statistical records of Metropolitan Nashville Juvenile Court for a period of several years were examined to ascertain the number and percentage of children over whom jurisdiction had been waived by the juvenile court. Then the records of approximately fifty children over whom jurisdiction had been waived by this court were closely examined. An attempt was made to ascertain the disposition which the criminal court made of some of those cases waived.

Before proceeding with the examination of the present Tennessee statutes and their operation, perhaps a brief history of the jurisdiction of the juvenile court in Tennessee will be useful.

A. *A Brief History of Juvenile Courts in Tennessee*

In 1911, an act was passed by the Tennessee legislature to "define and regulate the treatment and control of . . . delinquent children."¹³³ The upper age limit was the seventeenth birthday¹³⁴ with the further proviso that:

any child who shall have committed a misdemeanor or felony, and who shall have been found by the court to be a delinquent child . . . and who shall thereafter be found by the court to be incorrigible and incapable of reformation or dangerous to the welfare of the community may, in the discretion of the court, be remanded . . . and be tried for such crime.¹³⁵

Delinquency, Neglect, and Dependency Jurisdiction of the Juvenile Court, JUSTICE FOR THE CHILD 44 (Rosenheim ed. 1962).

131. See Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELINQUENCY 3 (1962).

132. Unless referred to specifically, waiver will also be used to include the transfer to criminal court. Actually there is a two stage process—waiver by the juvenile court and then transfer to the criminal court.

133. TENN. ACTS 1911, ch. 58, at 111.

134. TENN. ACTS 1911, ch. 58, § 1, at 111.

135. TENN. ACTS 1911, ch. 58, § 9, at 117.

Moreover, the statute further provided:

If, upon the investigation of a cause coming under the terms of this title, the judge of the juvenile court shall conclude that there is probable cause to believe that the child has been guilty of the crime of rape, murder in first degree, or murder in the second degree, the court shall at once dismiss said cause . . . to be dealt with . . . as provided in criminal laws.¹³⁶

In other words, the juvenile court had original jurisdiction over all children up to age seventeen, with discretion to waive jurisdiction if a delinquent of any age were found to be incorrigible. The juvenile court judge was required to so waive and remand if he found probable cause to believe the child had committed certain specified crimes. A limiting provision on disposition was that the juvenile court could commit a child for a period only up to his twenty-first birthday.¹³⁷

The courts themselves, however, added gloss to these statutory provisions. The common law presumption as to the capacity of children to commit crimes was reaffirmed in *Juvenile Court v. Humphrey*,¹³⁸ but, evidently, the court held that the presumption need not be recognized in the juvenile court since the proceedings are not criminal. *Wiggins v. State*¹³⁹ concluded that the incorrigibility of a child is a determination solely for the juvenile court and its finding is binding upon the criminal court and subject to review only by the circuit court on certiorari. The finding as to "incorrigibility" was *res judicata* and not subject to review by habeas corpus. However, the Supreme Court of Tennessee had earlier held that where the juvenile court is without jurisdiction, as where the child is probably guilty of murder, the child is entitled upon habeas corpus to be released for the custody of the juvenile court.¹⁴⁰ Construing the provision for mandatory transfer, the court in *Howland v. State*¹⁴¹ held that where murder is charged, a preliminary examination before the juvenile court was not necessary to confer jurisdiction to the criminal court.

The 1911 act was repealed in 1955.¹⁴² The 1955 act extended the

136. *Ibid.*

137. *Ibid.*

138. 139 Tenn. 549, 201 S.W. 771 (1918). The court did not have to face the issue squarely since the defendant was a seven-year-old charged with murder, and the juvenile court was required to transfer to the criminal court upon the finding of probable cause to commit murder.

139. 154 Tenn. 83, 289 S.W. 498 (1926).

140. *Juvenile Court v. Humphrey*, *supra* note 138.

141. 151 Tenn. 47, 268 S.W. 115 (1925). Thus every child charged with one of the specified crimes did not have to appear before the juvenile court. However, if during the investigation of a case, the juvenile court found probable cause, the juvenile court was required to waive its jurisdiction.

142. TENN. ACTS 1955, ch. 177, at 670.

upper age limit of the juvenile court's jurisdiction to the eighteenth birthday.¹⁴³ The act provided for a mandatory transfer by the juvenile court if it found probable cause that the child had committed rape or murder, regardless of the child's age.¹⁴⁴ However, the discretionary waiver was limited to "incurrigibles" sixteen years of age or older who had previously been declared delinquent and committed to a state institution, and who had committed a felony while in the custody of, or following the release from, the institution.¹⁴⁵

The waiver provisions, as of 1965, are more clearly expressed than previously, but, at the same time, are more complex and detailed. The juvenile court still has original and exclusive jurisdiction of all offenses committed by persons under eighteen years of age except for those for which it is authorized to waive jurisdiction.¹⁴⁶ The juvenile court has discretion to waive its jurisdiction in four distinct situations.¹⁴⁷ The only situation examined in any detail by this article is that presented by section 37-264(1)(a) which primarily was added in 1959.¹⁴⁸

(1) The juvenile court after full investigation and hearing may order a child held for prosecution and sentencing as an adult in the court which would have jurisdiction if the child were an adult when:

(a) A child sixteen (16) years of age or over is alleged to have committed an act which would have been a felony if committed by an adult, and a finding is made by the juvenile court that the child is not feeble-minded or insane, is not reasonably susceptible to the corrective treatment in any available institution or facility within the state designed for the care and treatment of children or that the safety of the community requires the child to continue under restraint for a period extending beyond his twenty-first birthday.

Section 37-265 provides, generally, that if the juvenile court, after

143. TENN. ACTS 1955, ch. 177, § 1. See TENN. CODE ANN. § 37-242 (Supp. 1965). For criticism, see *Juvenile Court of Davidson County, 1958 ANNUAL REPORT* 1.

144. TENN. ACTS 1955, ch. 177, § 24, at 684.

145. TENN. ACTS 1955, ch. 177, § 23, at 683-84. "That any child sixteen years of age or older who has been declared a delinquent . . . and who has been committed to a state institution for the detention and education of delinquent children and who shall, while, in the custody of said institution or following his release from such institution, commit a felony, and who as the result of such felony, shall be found by the court to be incurrigible and incapable of reformation or dangerous to the welfare of the community may, in the discretion of the court, be remanded to the . . . criminal court. . . ."

146. *Greene v. State*, 210 Tenn. 276, 358 S.W.2d 306 (1962).

147. TENN. CODE ANN. § 37-264 (Supp. 1965). Subsection (b) applies to children sixteen years of age or older who commit acts while in the custody of a state institution for delinquents. Subsection (b2) is applicable to children who have previously appeared before the juvenile court and have been declared incurrigible. Subsection (b3) applies to children sixteen or older who while confined in a juvenile institution commit an act of assault and battery with a deadly weapon.

148. See TENN. ACTS 1959, ch. 207, § 1, at 598.

investigation, concludes there is probable cause that the child has been guilty of rape, murder in first degree, or robbery by the use of a deadly weapon,¹⁴⁹ the court must waive jurisdiction and remand to the criminal court. However, if the child is under fourteen years of age, the judge need not remand.¹⁵⁰ Moreover, if any child is remanded to the criminal court and convicted of any lesser included offense,¹⁵¹ he "shall" be remanded back to the juvenile court for disposition.

Before the juvenile court can waive its jurisdiction under section 37-264(1)(a), the following preliminary steps are necessary: (a) a finding that the act would be a felony if committed by an adult; (b) a full investigation; (c) a hearing; (d) a finding that the child is not feeble-minded or insane; (e) a finding that the child is not reasonably susceptible to the corrective treatment in any available institution or facility within the state designed for the care and treatment of children or that the safety of the community requires restraint of the child.¹⁵² The preliminary steps under section 37-265 are: (a) investigation of an act; (b) finding of probable cause that the child is guilty of rape, murder in first degree or robbery by the use of a deadly weapon. But, a child can still, doubtless, be tried in criminal court for these particular crimes without the child ever appearing before the juvenile court.¹⁵³ In the presentation that follows, it will be assumed that these procedural steps are used by the court.¹⁵⁴

B. *Implications of Exercise of Waiver*

The exercise of the authority to waive jurisdiction has significance for the child involved, for juvenile court procedure and for the public. In trying to see and understand the actual functioning of the waiver process, three questions must be asked: (1) How many children are affected and who is the typical child? (2) What are the criteria involved, that is, what investigation is conducted and what is its value? (3) What are the after-effects of waiver—what disposition problems are presented?

1. *Number Affected and Typical Child.*—In the Davidson County

149. TENN. CODE ANN. § 37-265 (Supp. 1965). The addition of robbery by the use of a deadly weapon was made by TENN. ACTS 1965, ch. 132, § 1.

150. This provision was added by TENN. ACTS 1965, ch. 131, § 1.

151. For problems in determining what is a lesser included offense, see TENN. CODE ANN. § 40-2520 (Supp. 1965).

152. *Cf.*, STANDARD ACT § 13. In the comments to § 13, the Children's Bureau's position is presented. The Children's Bureau preference appears more similar to the Tennessee statute.

153. See note 141 *supra*.

154. See STANDARD ACT § 19. The act contains a separate sentence devoted to the procedure to be used at the hearing. For a study of the actual procedure followed in many juvenile courts, see Note, 79 HARV. L. REV. 775 (1966).

Juvenile Court in 1963 there were 2,788 individual delinquent children brought before the court.¹⁵⁵ 30.4 per cent, or 847, were seventeen years of age. In 1962 there had been 2,499 individual delinquent children before the court and 794 or 31.8 per cent were seventeen.¹⁵⁶ In 1963 there were 28 remanded to criminal court or approximately 1 per cent of the total.¹⁵⁷ In 1962 there were 40 remanded to criminal court or approximately 1.6 per cent of the total.¹⁵⁸ All of the children remanded in both 1962 and 1963 were seventeen years old at time of remand. Thus, 3.3 per cent of the seventeen year olds were remanded in 1963 while approximately 5 per cent were remanded in 1962.

To obtain a clearer concept of the typical child over whom jurisdiction is waived, the records of such children for a period of 17 months were examined.¹⁵⁹ During this period, the juvenile court remanded 49 children to the criminal court, all of whom were seventeen years of age and males. All had previously been before the juvenile court; one had already appeared 18 times. No accurate records were kept of the number of previous appearances, but in the 1963 statistics of the court it is noticed that approximately 6 per cent of the seventeen year olds had appeared before the juvenile court at least three times.¹⁶⁰ As already noted, 1 per cent of the seventeen year olds then had been remanded to the criminal court. Most had previously been committed to the state training schools with several having been committed more than once and one having been committed five times.¹⁶¹ Some had previously committed more serious

155. Juvenile Court of Davidson County, Tennessee, 1963 ANNUAL REPORT 3. [hereinafter cited as 1963 REPORT].

156. Juvenile Court of Davidson County, Tennessee, 1962 ANNUAL REPORT 3. [hereinafter cited as 1962 REPORT].

157. 1963 REPORT 25.

158. 1962 REPORT 20.

159. The records were examined of children over whom jurisdiction had been waived from May 1, 1964 to November 1, 1965. The consent of Mr. Sam Davis Tatum, Judge, Juvenile Court of Metropolitan Nashville, was obtained and is gratefully acknowledged.

160. 1963 REPORT 4.

<i>Number of Times in Court</i>	<i>Number of 17 Year Olds in Court</i>	<i>% Per cent</i>
1	670	79.1
2	125	14.8
3	30	3.5
4	11	1.3
5	8	1.0
6	1	.1
7	2	.2

161. Forty-three of the forty-nine had previously been committed to the state training school. One had been committed before the age of twelve by special permission of Commissioner of Correction.

offenses than the offense for which they were remanded,¹⁶² or had previously been found guilty of the same offense.¹⁶³ Twenty-nine of the forty-nine were before the court for either third degree burglary, larceny of an auto or petit larceny.¹⁶⁴ Five were before the court for armed robbery. In three cases probable cause was found that the child had committed rape and he was remanded.

From these statistics certain general indications are discerned as to the child most likely to be remanded. He is seventeen years of age, white and has been before the court several times previously. Although the offense for which he is charged may be serious, it may not be controlling as to whether he will be remanded. He will most probably have been charged with committing a crime against property, rather than against another person. He, doubtless, has previously been committed to a state reformatory.

2. *Criteria for Waiver.*—If these are the children remanded to the criminal court, logical questions arise as to why they were remanded, and on what basis. Answers to these questions should reveal the court's criteria.

The legal standard to be satisfied before there can be waiver and transfer under section 37-264 is different from the standard imposed by section 37-265. Under section 37-264, only "incorrigible" children can be waived and transferred.¹⁶⁵ "Incorrigible" was also the standard required by the acts of 1911 and 1955. Apparently, however, the word "incorrigible" was never defined in cases construing these acts.¹⁶⁶

162. *E.g.*, one child had earlier been found guilty of armed robbery but was bound over for petit larceny.

163. *E.g.*, one child had previously been found guilty of armed robbery but later bound over when he had again committed the same offense.

164.

<i>Offense Before Court</i>	<i>Number of Children</i>
3rd degree burglary	14
Armed robbery	5
Rape	3
1st degree burglary	1
2nd degree burglary	1
Loitering	1
Petit Larceny	7
Grand Larceny	4
Shoplifting	1
Assault with intent	1
Larceny of auto	8
Traffic	1
Assault and battery	2

165. In all of the records examined involving transfers under § 37-264, this term and standard was used.

166. "Incorrigible" may have been defined as "incapable of reformation" under the 1955 ACT. See TENN. ACTS 1955, ch. 177, § 23. However, the word "incorrigible" was also used independently of this phrase.

The 1959 amendments¹⁶⁷ eliminated the word "incorrigible" from the statute and instead used "is not reasonably susceptible to . . . corrective treatment."¹⁶⁸ This latter phrase appears to comply with accepted definitions of incorrigible.¹⁶⁹ In contrast, section 37-265 requires a finding of probable cause that the child has committed certain felonies before the juvenile court is deprived of jurisdiction. But neither section requires a finding of guilt.

Initial inquiry was made as to what constitutes the "investigation," as required by statute, before the juvenile court waives its jurisdiction.¹⁷⁰ The file on the particular child, as found in the court's records, was always found to contain: (1) the personal history of the child, including his age, sex, address, names of parents, names and numbers of brothers and sisters, and place of his parents' employment; (2) the previous delinquency record of the child, including his previous appearances, the charge filed and the disposition; (3) statements from both the child and the prosecutor as to the offense charged; (4) the social history of the child; (5) the school record of the child, including the grades completed in school, his attitude in school, and whether he currently attended school; (6) the church record of the child, including whether he belonged to a church and whether he attended; (7) the planning and recommendations by the probation officer assigned to the case, including an analysis of the child's attitude and a recommendation of a particular disposition.¹⁷¹ Other items occasionally found were an arresting officer's report and a report by a psychiatrist.¹⁷² Reports of mental condition were made in four of the cases examined with the costs being charged as regular court costs.¹⁷³ The juvenile court judge always made a finding as to "incorrigible" or "probable cause," and mailed the finding together with the previous delinquency appearances to the district attorney general.

Generally, the scope of the investigation conducted appears adequate even though no statute specifies the contents or actual purpose

167. TENN. ACTS 1959, ch. 207, § 1.

168. TENN. CODE ANN. § 37-264 (Supp. 1965).

169. 20A WORDS & PHRASES 378 (perm. ed. 1959).

170. "Investigation" is found in both § 37-264 and § 37-265. It has already been pointed out that actually the criminal court may acquire jurisdiction of the child without there first being an investigation by the juvenile court under § 37-265.

171. See Appendices A & B *infra* for illustrative cases.

172. See TENN. CODE ANN. § 33-501 (Supp. 1965), as to commitment to determine mental retardation; TENN. CODE ANN. § 33-701 (Supp. 1965), as to commitment to mental hospital for observation and care. See Nashville Tennessean, Dec. 15, 1959, p. 42, for announcement by Metropolitan Health Department that it will provide psychiatric services to the juvenile court in the future.

173. See TENN. CODE ANN. § 33-701 (Supp. 1965), for procedure to follow and the charging of costs. Cf. TENN. CODE ANN. § 37-257 (Supp. 1965).

of the investigation. The Standard Juvenile Court Act¹⁷⁴ requires that the investigation cover "the circumstances of the offense or complaint, the social history and present condition of the child and family, and plans for the child's immediate care, as related to the decree." A study commission has stated that the investigation should include "in detail": (1) a statement of the present problem; (2) previous problems; (3) family background; (4) developmental history of the child; (5) agency contacts; (6) sources of information; (7) resources available for treatment; and (8) plan for treatment.¹⁷⁵ However, the substance of the investigation should receive more stress than the topics covered. In general, the actual content should depend upon the type of case and the issue at stake.¹⁷⁶ The social study should entail more than just securing a mass of facts and clinical reports. There should be evaluation and interpretation of these facts, and consideration should be given to the child's attitude toward the delinquent act.¹⁷⁷ The sufficiency of the substance of the investigation reports examined might be questioned.¹⁷⁸

Assuming that the judge has the results of a thorough investigation before him, he must establish the criteria for transfer. The following have been suggested as possible criteria:¹⁷⁹ (1) the judge should base his decision upon both the age and the offense, not the age alone; (2) he should base his decision upon the findings of the investigation and the hearing, not on the question of guilt; (3) he should ask whether the issues of contestable fact indicate that the hearing in the juvenile court will be prolonged; (4) he should determine whether the offense, occurring after correctional treatment for a previous offense, is serious; (5) he should ponder the "hopelessness" of the case; (6) he should decide whether the child needs to be punished for his attitude; (7) he should decide whether the advantage in resources for treatment and public safety lie with the criminal court rather than the juvenile court.

Applying these possible criteria to the statistics of the juvenile

174. STANDARD ACT § 23.

175. Legislative Council Committee, State of Tennessee, Final Report, Penal System Study 197 (1960). [hereinafter cited as Penal Report].

176. Children's Bureau, U.S. Department of Health, Education and Welfare, Standards for Specialized Courts Dealing with Children 50 (1954).

177. *Ibid.*

178. For a short discussion of the social study, see Advisory Council of Judges of National Probation and Parole Association, *Guides for Juvenile Court Judges* 49 (1957). The author is reluctant to express an opinion on the "investigations" since he lacks the qualifications to do so. However, some of the investigations conducted seemed to be skimpy, to say the least. The material presented in the appendices represents probably two of the best files examined as far as contents of the social study is concerned.

179. See Advisory Council of Judges, *supra* note 131, at 5.

court previously presented, certain of the factors seem indeed significant. The age of the child is a controlling factor where the transfer is discretionary. Not all seventeen-year-old boys are transferred, but only seventeen-year-old boys are transferred. The judge apparently uses the findings of the investigation and hearing before remanding and does not make a finding as to guilt of the offense charged. However, the persuasiveness of the investigation was not determined. That issues of contestable facts might require a prolonged hearing in juvenile court does not appear significant since the issue is only "incurable" or not, and not guilt. That the offense is serious is obviously controlling when there is probable cause as to rape, first degree murder or robbery with use of a dangerous weapon. The seriousness of the offense coupled with prior correctional treatment is important since all of the offenses were felonies and most of the children had previously been committed to the reformatory. That the case is hopeless may be a conclusion of the judge but not necessarily a factor in his decision. That the child needs to be punished for his attitude seems important, especially since most of the children remanded have been offenders over a period of years. That the advantages in resources for treatment and public safety in the criminal court outweigh the advantages for remaining in the juvenile court are highly persuasive since the juvenile court declares the child either not to be susceptible to its treatment¹⁸⁰ or too dangerous not to be restrained beyond his twenty-first birthday.¹⁸¹

Certain special problems of the waiver process merit at least brief mention. Can the juvenile request waiver? The Tennessee Supreme Court held under the 1911 Act that if the juvenile court is without jurisdiction, the child is entitled to be released from custody.¹⁸² Whether the child can declare himself incurable so as to oust the juvenile court of jurisdiction and then demand waiver has not been presented in reported Tennessee cases. A juvenile court judge in another state has stated that he does consider the child's preference.¹⁸³ A second question is whether the criminal court can refuse waiver. Apparently the criminal court is bound by the juvenile court's decision since the Tennessee Supreme Court held under the 1911 Act that the criminal court was so bound.¹⁸⁴ Finally, if the juvenile court waives its jurisdiction and remands, is the criminal court required

180. *I.e.*, incurable.

181. This restraint applies to transfers both under § 37-264 and the reason for transfer under § 37-265.

182. See *Juvenile Court v. Humphrey*, *supra* note 138.

183. Advisory Council of Judges, National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELINQUENCY 3, 5 (1962).

184. *Supra* note 139 and accompanying text.

to report its disposition of the child to the juvenile court? The Tennessee statutes do not require the criminal court to report and apparently they do not.¹⁸⁵ However, the Commissioner of Correction is required to report to the committing court at least once a year on the progress of any child committed to the department of correction.¹⁸⁶

The child, however, does have a statutory remedy to challenge the waiver. Section 37-273 provides that "any disposition" of a child by the juvenile court may be appealed by "either party" to the circuit court which shall hear the testimony of the witnesses and try the case de novo.¹⁸⁷ This is a notable departure from the statutory certiorari of the 1911 Act.¹⁸⁸ Section 37-273 by implication also requires the juvenile judge to make a written finding of the fact upon which his judgment was based.¹⁸⁹ However, the finding of fact is apparently limited to declaring the child "incurable" or finding "probable cause."¹⁹⁰

3. *Actual Implications of Waiver.*—The key questions as to the implications of waiver for the child are what happens to the child who is transferred to the criminal court and how does the disposition compare with similar cases in the juvenile court.

Basically, the juvenile court, after finding the child delinquent, can either place him on probation or commit him to an institution.¹⁹¹ Thus the court can continue the hearing from time to time while the child is allowed to remain in his home or is placed in a suitable family home, always being subject to the visitation of a probation officer. The court can commit the child either to the department of correction or to any institution or voluntary agency licensed under the laws of the state to care for delinquent children. Section 37-262¹⁹² provides that when any child is committed to the department of correction, the Commissioner is obligated to determine the most appropriate facility for the rehabilitation of the child. Essentially,

185. In no file examined was there a report from the criminal court to the juvenile court even though some of the juveniles had previously been bound over to the criminal court.

186. TENN. CODE ANN. § 37-262 (Supp. 1965).

187. TENN. CODE ANN. § 37-273 (Supp. 1965). See *Lokey v. Griffin*, 45 Tenn. App. 236, 322 S.W.2d 239 (1958).

188. Neither can the child appeal directly to the supreme court. *Norrod v. State*, 201 Tenn. 577, 300 S.W.2d 926 (1957).

189. The statute does not expressly require a finding by the judge in every case. For problems arising as to the findings of the juvenile judge in Alabama, see *Stapler v. State*, 273 Ala. 358, 141 So. 2d 181 (1962); *McLaughlin & McGee, Juvenile Court Procedure*, 17 ALA. L. REV. 226, 235 (1965).

190. In the files examined, only a one or two sentence finding was made by the judge.

191. TENN. CODE ANN. § 37-259 (Supp. 1965).

192. TENN. CODE ANN. § 37-262 (Supp. 1965).

there are four institutions and a forestry camp to which the Commissioner can commit the delinquent.¹⁹³ As provided under section 41-831, any delinquent may be committed to these institutions. However, children under the age of twelve must either have committed a capital offense or have the express approval of the Commissioner of Correction before they can be so committed. Section 41-832 makes special provisions for the children committed to an institution for the commission of a felony. It provides that the child may be retained until his twenty-first birthday. At any time after his eighteenth birthday however, he may be transferred to the penitentiary if the superintendent finds him to be incorrigible and the Commissioner of Correction approves. However, if the minor is transferred to the penitentiary, the authority of the warden is derived from the jurisdiction of the juvenile court and thus the warden cannot hold the person after he reaches his twenty-first birthday.¹⁹⁴ Of course, two fundamental limitations are imposed on all commitments by the juvenile court. First, the juvenile court can commit only for an indefinite period of time.¹⁹⁵ Second, a child cannot be committed by the juvenile court for a period extending beyond his twenty-first birthday.¹⁹⁶

The disposition which the criminal court can make of the child over whom the juvenile court has waived jurisdiction seems less than clear from the statutes themselves. Prior to 1955, apparently all boys under the age of eighteen who had been convicted of an offense punishable by confinement in the penitentiary had first to be confined in the training schools.¹⁹⁷ Incorrigibles, murderers and rapists, after reaching age eighteen, could then be sent to the state penitentiary.¹⁹⁸ However, these sections were repealed in 1955.¹⁹⁹ Section 41-827²⁰⁰ now provides that the state vocational training schools are "for the detention and education of children found to be delinquent." Section 41-832²⁰¹ provides that:

Any child committed to such institution for an offense punishable by

193. See TENN. CODE ANN. § 41-284 (Supp. 1965), for authorization of State Vocational Training School For White Boys and State Vocational Training School For Colored Boys. For authorization as to girls, see § 41-825 as to white girls and § 41-826 as to colored girls. For comment on operations and facilities of the institutions, see Penal Report 67-71, 115-35. The forestry camp was established in 1961. See TENN. CODE ANN. §§ 41-840 to -848 (Supp. 1965).

194. *State v. Bomar*, 210 Tenn. 249, 358 S.W.2d 295 (1962).

195. TENN. CODE ANN. § 37-262 (Supp. 1965).

196. TENN. CODE ANN. § 37-263 (Supp. 1965).

197. See TENN. ACTS 1907, ch. 599, § 4, at 2025.

198. See TENN. ACTS 1907, ch. 599, § 5, at 2026.

199. TENN. ACTS 1955, ch. 127, §4.

200. TENN. CODE ANN. § 41-827 (Supp. 1965).

201. TENN. CODE ANN. § 41-832 (Supp. 1965).

confinement in the penitentiary may be retained in such institution until his or her twenty-first birthday, or at any time after his or her eighteenth birthday, when found to be incorrigible by the superintendent . . . may be transferred to the penitentiary.

Whether the phrase—"any child committed to such institution for an offense punishable by confinement in the penitentiary"—applies to children sentenced by the criminal court as well as children committed by the juvenile court is not clear from the statutes and has not arisen in the cases. Section 37-265,²⁰² dealing with children remanded after a finding of probable cause, seems expressly to provide that children may be committed to a juvenile institution by the criminal court and at age eighteen be transferred to the penitentiary unless rehabilitated. At any rate, recently a sixteen-year-old boy was sentenced by the criminal court for a term of twenty years in the state training school after being found guilty of rape by the criminal court.²⁰³ Doubtless, children convicted in criminal court after being waived as incorrigible under section 37-264 can also be committed to the training schools by the criminal court, but children remanded under either section 37-264 or section 37-265 can also be sentenced to the state penitentiary,²⁰⁴ the county workhouses²⁰⁵ or committed to county or city reformatories.²⁰⁶

Section 37-265, in itself, appears to have raised some disposition problems. It provides that if the juvenile court remands to the criminal court after finding probable cause for rape, first degree murder or robbery by use of a deadly weapon, and the criminal court convicts the child for a lesser included offense, the criminal court must then remand to the juvenile court for disposition only. At least two difficulties are presented by the section. What is a "lesser included offense"? Section 40-2050²⁰⁷ defines "lesser included offense" but construing the statute may be a problem.²⁰⁸ Second, the juvenile court cannot commit a child for a period extending beyond his twenty-first birthday and further can commit only for an indefinite period. What

202. TENN. CODE ANN. § 37-265 (Supp. 1965).

203. Nashville Tennessean, Dec. 4, 1965, p. 12. Jurisdiction was apparently waived by the juvenile court under § 37-265.

204. See TENN. CODE ANN. §§ 41-206, 41-302, 41-304, 41-305 (Supp. 1965); see also § 40-2707, cited in 25 TENN. L. REV. 366 (1958) as the indeterminate sentence in Tennessee; *Greene v. State*, 210 Tenn. 276, 358 S.W.2d 306 (1962), where a fifteen-year-old boy had been sentenced to ten years in the penitentiary.

205. See TENN. CODE ANN. §§ 41-1201 to -1236 (Supp. 1965). In most of the files examined in the district attorney's office, most of the waived children had been committed to the workhouse.

206. See TENN. CODE ANN. §§ 37-401 to -456 (Supp. 1965).

207. TENN. CODE ANN. § 40-2050 (Supp. 1965).

208. See *Greene v. State*, *supra* note 204.

should the juvenile court judge do?²⁰⁹

Thus, there is a difference between being committed by the juvenile court and sentenced by the criminal court. The powers of the juvenile court are restricted by the same statutes that create it. Perhaps the establishment of a reformatory for juvenile offenders and first offenders might at least eliminate the problem of finding the proper place of confinement for these juveniles in the first instance.²¹⁰

C. *Why Waiver?*

If children are supposed to be protected by the juvenile court, one may ask why the juvenile court waives its responsibility and adds to the burden already imposed upon the criminal court.

Five basic reasons have been offered to explain the need for the waiver provisions.²¹¹ First, some young offenders are really not "children." They have indicated by their actions and attitude that "child" would be an erroneous and inaccurate label for them. Second, certain cases are hopeless. Implicit in this assertion may be that if treatment does not work, punishment will. Third, the juvenile court may lack facilities to "treat" some children. But does this mean that the criminal court has proper facilities? Fourth, the waiver provisions are needed to protect the experiment—the juvenile court as an experiment. Finally, perhaps the provisions indicate that society demands vengeance for violations of its code and values.

Doubtless, some of the reasons offered might be denoted as factors which lead to the enactment of the waiver provisions. Yet to try to determine the force of their influence could lead to many possible answers and thus to no definite conclusions. Perhaps inquiry into the inferences that might be extracted from their actual operation in, and effect upon, juvenile court procedure would be more beneficial to the court and society.

In Tennessee, do they indicate that the juvenile court looks primarily to commitment to institutions because probation services are ineffective? The criminal court can commit for a longer period of time than the juvenile court. In their actual operation in Tennessee, do they indicate that the older child receives harsher treatment? Do they indicate that the needs of the child are always the controlling factors in the juvenile court or in the legislature? Do they indicate that the juvenile court is to subordinate concern for the individual in order to protect the community?

209. See Nashville Tennessean, Oct. 13, 1965, p. 8, where a judge was placed in such a dilemma. The article did not state what the judge did.

210. See Penal Report 40.

211. Sargent & Gordon, *Waiver Of Jurisdiction*, 9 CRIME & DELINQUENCY 121, 122 (1963).

D. Conclusion

The waiver provisions produce a conflict between the ideal of the juvenile court that the "best interests" of the child shall be protected and the demand of society that society be protected. Perhaps in so doing, they help define the true role of the juvenile court. The juvenile court is a part of our legal system, a system which must protect many interests of individuals and groups. The juvenile court can do no less. Apparently, the United States Supreme Court in the 1965 term has adopted this view of the juvenile court.²¹² The waiver provisions are, thus, a necessary adjunct of the powers of the juvenile court judge. The individual judge determines their effectiveness—as is true of the juvenile court itself.

C. WILLIAM REINEY

Appendix A

When Bobby was brought before the Juvenile Court he was seventeen years old, white and charged with third degree burglary—breaking into a neighborhood grocery store and stealing cigarettes, candy and possibly a billfold.²¹³ He had completed the ninth grade in school, but currently was not attending school.

Bobby's father is forty-five years old and employed as a truck driver. The probation officer describes him as a weak disciplinarian. The mother is forty-four and a housewife. She is described by the probation officer as overly protective. Bobby has three brothers. Joe is eighteen and handicapped. Ed is fifteen and has previously appeared before the juvenile court. John is eleven. The family receives no welfare aid.

Bobby's attitude in school had been described by one of his former teachers as fair, even though he did not enjoy mathematics. Bobby is not a member of a church and does not attend.

Bobby made a statement to the probation officer. He does not deny breaking into the store. His explanation is that he took some pills, probably his mother's sleeping pills and went to bed. He awakened during the night and, unable to sleep, "wandered" out of the house and suddenly realized he had broken into the store. The prosecuting party claims that Bobby tore up his store looking for money. He says he wants to prosecute so that the boy will receive help. Bobby has previously broken into the store.

This is Bobby's fourth appearance before the juvenile court. In 1960, at the age of

212. *Kent v. United States*, 383 U.S. 541, 556 (1966). The Court states that: "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." The defendant, Kent, had appeared before the District of Columbia Juvenile Court on charges of housebreaking, robbery and rape. Proceeding under a discretionary waiver statute requiring only a "full investigation" of the charges, the juvenile court judge transferred Kent to the criminal court. The court of appeals affirmed. On petition of certiorari, the Supreme Court reversed. As a condition to a valid waiver order, the juvenile was entitled to a hearing including access by his counsel to the social records and probation or similar reports which presumably were considered by the court, and to a statement of reasons for the juvenile court's decision. The decision, doubtless, has broad implications for the future operations of the juvenile court.

213. Appendices A and B contain summaries of the records of actual cases. The cases are not presented as typical cases. Perhaps they represent the unusual case as far as the records examined in this study. They do illustrate the difficulty of making a decision to waive jurisdiction even when the judge has adequate, or near adequate, evidence on which to make his decision.

twelve, a delinquency petition was filed against him but the matter was settled unofficially. In 1964, at the age of sixteen, he was charged with first degree and third degree burglary—theft of a bicycle. He was found guilty and sent to Central State Hospital for examination. His father paid the costs. On being released after a further hearing, he was confined to the state training school for about four months. In February of 1965 he was charged with three acts of third degree burglary and found guilty. He was confined to the state training school for about six months. On release, the officials described his improvement as "remarkable." Three weeks later, he was charged with the present offense.

Two psychiatric reports are found in Bobby's file. At Central State Hospital in 1964, he was found to be suffering "from an emotional affection—namely, adjustment reaction of adolescence in a passive dependent personality causing him to commit anti-social acts." He is stated to have a dull, normal intellect with a poor attention span, and being hostile to authority. He was described as "relating good" away from adults. The hospital concluded that he needed "male identification" and recommended that he be sent to the state training school or placed in a proper foster home. A private psychiatrist concluded in 1965 that Bobby had no psychosis—he was just nervous. However, he was described as dissocial. No "medication" was prescribed.

The probation officer recommends that Bobby be sent to the state training school or bound over to the criminal court.

On September 29, the juvenile court, after a hearing, waived jurisdiction and transferred Bobby to the criminal court.

Appendix B

When Sammy was brought before the juvenile court he was seventeen, white and charged with grand larceny. He and three other boys, ages 15 and 17, had stolen a truck and stripped it of its contents of cigarettes, cokes and candy.

Sammy's father is fifty-eight and works for a lumber company. His father can neither read nor write, but wants his children to have the opportunities he was denied. His mother is thirty-nine and is his father's second wife. She has completed the third grade in school. Sammy has two brothers and a sister. John is sixteen and retarded. Mack is ten and retarded. Judy is three months. The family receives no welfare aid.

Sammy is not a member of a church and attends only occasionally. Sammy has completed most of his school years at a special school. In 1959, a case study was made by a social worker at the school. He was described as mentally retarded with an I.Q. of 75. Further, he lacked self-confidence and was tense. He was embarrassed because of his retarded brothers and was not working to his potential himself. His home conditions were listed as bad.

In a statement to the probation officer, the boys admitted the offense. The owner and prosecutor had left the keys in the truck, and they drove away with it.

This is Sammy's fifth appearance before the court. At the age of twelve, he was charged for being a "run-a-way," but the matter was disposed of without a hearing. At the age of fourteen he was charged with larceny of an automobile and received a suspended sentence to the state training school. At the age of fifteen, he was charged with violating the curfew law and third degree burglary. He and three other boys were found guilty of stealing copper tubing from a warehouse. He was sent to the state training school but released after a month on request of counsel retained by the boy's father. On release, an official of the school stated that Sammy had caused little trouble there, but predicted that Sammy would later get into more trouble. Shortly thereafter he was charged with petit larceny but the matter was disposed of without an official hearing. At the age of sixteen, he was charged with driving without a license, reckless driving and loitering. He was paroled to his father and fined ten dollars.

The probation officer recommends that Sammy be sent to the state training school.

On December 12, Sammy was transferred, after a hearing, to the criminal court. The other boys were sent to the state training school.